In the High Court of Judicature at Madras

Dated:21.03.2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.740 OF 1997

1. G.R.Silambu
2. G.R.Muthusamy
3. G.M.Rajamani Gounder .. Appellants/Defendants

v

1. K.R.Arumugam
2. Marakatham
3. Sengoda Nadar
4. Ravi
5. Nallasamy
6. S.Kandasamy
7. Chandrasekaran ..Respondents

(Plaintiffs 1 to 5 and Defendants 4 and 5

This second appeal is filed under Section 100 of CPC against the judgment and decree dated 28.2.1997 made in A.S.No.72 of 1996 on the file of I Additionall District Judge-cum-Chief Judicial Magistrate, Erode,Periyar District reversing the decree and Judgment in O.S.No.216 of 1992 dated 2.4.1996 on the file of the Court of I Additional District Munsif, Erode, Periyar District.

For Appellants : Mr.M.M.Sundresh
For Respondents : Mrs.P.T.Asha
for M/s Sarababhauman
Associates-R1 to R5
R6,R7-Given up.

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JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.72 of 1996 on the file of I Additional District Judge-cum-Chief Judicial Magistrate, Erode, Periyar District. The plaintiffs who have got a decree in their favour in a suit for bare injunction in O.S.No.216 of 1992 on the file of the Court of I Additional District Munsif, Erode but lost their case before the first appellate Court in A.S.No.72 of 1996 is the

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appellants herein before this Court.

2. The short facts narrated in the plaint in brief for the purpose of deciding this appeal sans irrelevant particulars are as follows:
The plaint schedule property is a vaikkal deep bore well situated in Old Survey field No.653 of Punjai Kalamangalam Village,Erode Taluk. The plaintiffs together are entitled to 3/16th share in the suit well by purchase. The plaintiffs 3 to 5 are entitled to 13/36th share in the suit well ancestrally. The plaintiffs are in possession and enjoyment of the suit property by paying land tax. The defendants 1 to 3 together are owning 2/36th share in the well and the parties had partitioned their landed properties long ago.

2a) The plaintiffs had installed oil engines in the suit well and had been baling and pumping out water for iririgation purpose. The defendants 1 to 3 had also been irrigating their share from the suit well by installing oil engine and pumpset. The suit well is intended to irrigate old S.F.No.650 ,654-A and 655-B and an extent of 2 acres in Old S.F.No.650 of Punjai Kalamangalam Village, Erode Taluk. Ever since, the inception of the suit well, all the parties are irrigating only the aforesaid fields and they had never been taking water from the suit well to any other fields.

2b) The defendants 1 to 3 are rich people and they have got vast landed properties. The defendants 1 to 3 are owning old S.F.No.651 and other survey fields adjoining on the east of the Old S.F.No.650. With a view to take water from the suit well for irrigation to the other fields which had not been irrigated so far from the suit well, the defendants 1 to 3 dug a pit in their portion in old S.F.No.650 and made attempts on 5.2.1992 to lay under ground pipe from the suit well to the pit in their portion and from their to pump out water by mechanical device for irrigation to the other fields like old S.F.No.651 etc., If the defendants 1 to 3 succeed in doing so, the plaintiffs will not be able to get any water to irrigate their land and they will be put to serious loss and hardship. The plaintiffs are owning small extent of land and they are depending their livelyhood only upon the properties. As per law also the defendants 1 to 3 are not entitled to take water to other lands which had not so far been irrigated from the suit well. The plaintiffs obstructed the defendants 1 to 3 with their neighbours from their unlawful activities on that date. The defendants 1 to 3 went away saying that at any cost within a week, they will take water from the suit well to irrigate their land which has not been irrigated from the suit well or will lay underground pipes across the suit vani in north south to take Kalingarayan canal water directly to the pit in their portion from taking water to their fields. The

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said walls of the vani are mud portions. If the underground pipes are laid across the suit vani, the side walls will be completely destroyed. The well will be covered with mud and water will not be available for irrigation. Further in case of any repair in future in the underground pipes to be laid across the suit vani, the defendants 1 to 3 will obstruct the free flow of water to the suit well and thereby the nanja crops will be completely withered. The defendans 1 to 3 will translate their threat into action at any time.

2c) Since the defendants 4 and 5 have also got interest over the suit property, and they are unable to join as plaintiffs they have been added as defendants 4 and 5 in the suit. Hence the suit.

3. Defendants 1 and 2 have adopted the written statement filed by the third defendant as follows:
The plaintiffs are bound to prove their respective shares in the suit well , though this defendant admits that the same is common to the plaintiffs and the defendants. It is also denied that the suit well, from its inception, is ment to irrigate old S.F.Nos.653,654/A, 655/B and two acres in S.F.No.650. This defendant is attempting to take water from the suit well and irrigate other lands adjoining on the east of S.F.No.650. This defendant never attempting to lay pipe across to the suit vani for which this defendant is not entitled to. The suit well is not a perculation well at all. It is only a pit wherein Kalingarayan Canal water is channalised. There is no scarcity of water at all. The said well therefore is not meant to irrigate the plaint lands alone. Hence the principle that the well cannot be dissociated from the lands for which it is meant from its inception cannot be applied so far as the suit well is concerned.

3a) The defendants are not attempting to take water from the vani well in S.F.No.653 to irrigate his adjoining lands. Old S.F.No.653 is on the western side. Immediately on the east of S.F.No.653 is old S.F.No.650. The suit well is situate on the north-eastern cornor of S.F.No.653. In the said well, this defendant has got 1/18th share by virtue of a registered sale deed dated 11.8.1961. The said share now has gone to the defendants 2 and 3 by virtue of a registered partition deed dated 27.1.1986. In the suit well there are three oil engines. This defendant, one Muthusamy Nadar and one Kasiappa Nadar are owning a separate oil engine. The plaintiffs and other owners are owning two separate oil engines. Water from the suit well is taken in the channel given as channel"A" by the Commissioner.

3b) Immediately on the east of the suit well is the separate well of the defendants which is also Kalingarayan Vani well. The said well is situate on the north western corner of old S.F.No.650. In other words the suit well and the separate well of this defendant were touching each other separated by a

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north-south wall. In course of time, the wall that separated both the vani wells collapsed. Both the wells are not perculation wells the owners least bothered when the separation wall fell down. The remants of the existence of the separating wall is still available. The red marked wall in the Commissioner's report continued further north and separated the suit well in old S.F.No.653 and the separate vani well of the defendants in S.F.No.650 on the east. The defendants have installed a separate oil engine in the vani well in S.F.No.650 and taking water through their separate channel given as channel "B" by the Commissioner. So far as their separate well on the east of the red marked wall is concerned the defendants have constructed pucca parapet wall on the southern and eastern side. The defendants prior to the suit were attempting to lay pipe within their land to take water from their exclusive well in S.F.No.650 situate on the east of the red marked wall. The plaintiffs therefore, cannot have any objection for the same. The plaintiffs are in no way demnified by the said act. The plaintiffs are stooges in the hands of the enimies of the defendants. At their instigation and taking advantage of the fact that the wall separating the suit well on the west and separate well of the defendants on the east collapsed this vexatitious suit has been filed as if this defendant is attempting to take water from the suit well and irrigating his separate lands.

3c) So far as the well in S.F.No.650 is concerned, the same originally belonged to the family of this defendant and the family of one A.R.Vadivel, and his brothers Duraisamy and A.R.Rajavel each branch owning share. Under the partition deed dated 15.6.1953,
½ share therein referable to the family of this defendant was allotted to this defendant. The defendant amongst themselves entered into a partition on 27.1.1986 whereunder 1/2 share in the well in S.F.No.650 ie, the portion of the well east of the red marked wall was allotted to the defendants 2 and 3. On 7.8.1989, this defendant purchased the ½ share in the said well belonging to A.R.Vadivel, A.R.Duraisamy and A.R.Rajavel. Hence the suit well in entirety belongs to the defendants alone.

3d) The defendants are not laying any underground pipeline either across the suit vani in north-south or any portion in the suit survey field. The laying of pipe is not detrimental to the interest of the plaintiffs. The Commissioner's report and plan will completely belieing the case of the plaintiffs. The defendants intended to lay pipes in their land in S.F.No.650 alone. Hence the suit is liable to be dismissed.

4. The defendants in their additional written statement would contend that the suit is bad for misjoinder of parties

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since defendants 4 and 5 are not necessary parties to the suit.

5. On the above pleadings, the learned trial Judge has framed three issues and one additional issue for trial. The first plaintiff examined himself as P.W.1 and exhibited Exs A1 to A13. Third defendant has examined himself as D.W.1 and on the side of the defendants Exs B1 to B4 were marked. A Commissioner was appointed in this case to note down the physical features and his report is Ex C1 and plan is Ex C2.

6. After going through the available oral and documentary evidence let in by both sides, the learned trial Judge has come to a conclusion that the plaintiffs are not entitled to the relief asked for in the plaint and accordingly dismissed the suit . Aggrieved by the Judgement of the learned trial Judge, the plaintiffs have preferred an appeal in A.S.No.72 of 1996 before the I Additional District Judge-cum-Chief Judicial Magistrate, Erode, who has after due deliberation to the rival submissions of the parties concerned, and after scanning the evidence both oral and documentary has allowed the appeal thereby setting aside the decree and Judgment of the learned trial Judge in O.S.No.216 of 1992 which resulted in a decree in favour of the plaintiffs which necessitated the defendants to prefer this second appeal before this Court.

7. The substantial question of law involved in this appeal is

> Has not the first appellate Court committed in error of law that the respondents/plaintiffs have established their right have a decree for permanent injunction without any relief for declaration?

8. Heard Mr.M.M.Sundaresh, learned counsel appearing for the appellants and Mrs. P.T.Asha, learned counsel appearing for the respondents and considered their respective submissions.

9.The Points:

The admitted case of the parties is that both the plaintiffs and the third defendant are having right to bail water from the well situate in Old S.F.No.653. The plaintiffs have filed a suit for mere injunction to restrain the defendants from taking water from the well situate in Old S.F.No.653 to the adjoining land of the defendants in S.F.No.651.

Ex B1 is the sale deed in favour of the third defenant executed by one Karupanna Nadar and his wife Kuppayee ammal. The third defendant has purchased 1/18th share in Survey Nos 653,654/A1 and 655/B measuring total extent of 0.39 13/18 cents along with 1/3rd share in the well situate therein, besides to use the lands to get ingress and egress into Odai Poramboke land. Besides their

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right in two coconut trees and 1/3rd right common in another coconut tree and also to take the cattles through the said land. Ex B2 is the partition deed entered into between the third defendant and Silambanna Gounder , his son Rajagounder. Silambanna Gounder is the uncle of the third defendant. In Ex B2,"C" schedule property was allotted to Rajamani Gounder. Under Ex B2, 1/3rd right in the well situate in survey No.650 was given to the third defendant with a right to take water through the channel leading to his land. It is futher recited in Ex B2 that in survey No.651, there is another well situate with Kamalai facilities .

10. The learned counsel appearing for the respondents would contend that since a separate well is situate in Survey No.651 itself, there is no necessity for the third defendant to take water from the well situate in Suit survey No.650 for the purpose of irrigating crops raised in S.No.651. The learned counsel appearing for the respondents relying on Sivarama Pillai and others and others, appellants -vs- Marichami Pillai, respondent (AIR 1971 Madras 230) and would contend that from a joint well under a partition, the right of taking water from the joint well cannot be dissociated from the land and water cannot be used to irrigate any other land and the infringement of right can be prohibited by injunction. The facts of the case is that there was a dispute between owners of adjacent lands who also had joint rights in a well. The family of the plaintiff and defendants 1 and 2 owned certain items of lands of a total extent of 4 acres and 17 cents which were irrigated by a well situate in the lands. Under a partition arrangement of the year 1952, the properties were divided equally and two items of lands of total extent of 2 acres 3 cents were allotted to the plaintiff and 2 acres and 14 cents were allotted to the defendants. It is common ground that as an integral part of this partiton arrangement, both the branches would have equal rights to take water from the well and that right should be worked out by the plaintiff taking water from the well for three days and the defendants in the next three days thereafter not even a case of one party taking for four days and the other party three days in the week. The allegation of the plaintiff is that in 1960, the defendants newly purchased two items of lands on the west of a total extent of 99 cents and irrigated the same from the well in question and that this act of the defendants abstracting water from the well for irrigating the lands newly acquired had resulted in a substantial diminution of water and thus seriously interfered with the plaintiff's right to take water from the well during his turn. So only on the basis of arrangement entered into between the parties in respect of the mode of drawing water from a common well, it was held in the above said dictum that the right to take water from a well cannot be dissociated from the land and it is necessarily implicit in the very partition arrangement that the water in the

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well was set apart and was intended to be used only for the lands which were previously irrigated by the common well. This limit or fetter applies to both the parties and that the party is entitled to irrigate any other land except the lands agreed between the parties to be irrigated with the water from the common well. But the case on hand, there is no such agreement entered into between the plaintiffs and the defendants to the effect that the water drawn from the common well situate in Survey No.650 to be irrigated only for the lands situate in Survey Nos.653,654/A1, and 655/B.

11. The learned counsel appearing for the respondents rely on a sale deed of the third defendant under Ex B1 and would contend that he had purchased only survey No.653, 654/A1 and 655/B comprising 0.39 13/18 cents and 1/3rd right in the common well in survey No.650 can be utilised only for the purpose of irrigating the lands purchased by him ie., survey No.653,654/A1 and 655/B under Ex B1. This contention of the leared counsel for the respondents cannot be hold any water because neither in Ex B2 nor in Ex B1 , there is a recital to the effect that water from the common well situate in Survey No.650 shall be utilised only for the purpose of raising crops in Survey No.653,654/A1 and 655/B.

12. A Commissioner was appointed in this case and he has filed his report Ex C1 and plan Ex C2. It is seen that the plaintiffs are having 3 motor pumpsets in the common well situate in Survey No.650 and the defendants are having only one oil engine motor towards their share for drawing water from the common well and the water drawn from the common well through the defendants oil motor pumpsets flows through the channel marked as "B" leading to the lands of the defendants marked as"C" wherein sugarcane crop has been raised. It is seen from Ex C2 plan that water for the well has been deviated by device arranged from the LPP Government channel running on the north. Since there is no impediment or embargo on the defendants from taking water from the common well and use the same as they like. The plaintiffs cannot ask for relief of restraining the defendants from taking water from the common well to survey No.651. Further it is seen from Ex B2 that in Survey No.651 itself, there is another well available. Only if the parties agree that by turn they are drawing water from the common well as far as its turn is violated, the plaintiffs may not have any grievance in drawing their share of water from the common well. The learned first appellate Judge under a wrong presumption that under Ex B1 and Ex B2, the defendants can only irrigate the lands purchased by them under Ex B1 from the water drawn from the common well situate in survey No.650 whereas the trial Court has analytically gone into the evidence and has come to a correct conclusion that

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the plaintiffs are not entitled to any relief asked for in the plaint.

13. Under such circumstances, this Court is left with no option but to interfere with the findings of the learned first appellate Judge in A.S.No.72 of 1996 on the file of the I Additional District Judge-cum-Chief Judicial Magistrate, Erode. Point is answered accordingly.

14. In the result, the appeal is allowed, setting aside the decree and Judgment in A.S.No.72 of 1996 on the file of I Additional District Judge-cum-Chief Judicial Magistrate, Erode thereby dismissing the suit in O.S.No.216 of 1992 on the file of the I Additional District Munsif, Erode with costs through out.
Sg

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1.I Additional District Judge-cum-Chief Judicial Magistrate, Erode.

2. I Additional District Munsif, Erode

3. The Record Keeper, VR Section, High Court, Madras

+ one cc to M/s. Sarvabhuman Associates, Advocate sr no. 17638

JRG(CO)
NM(26.04.07)

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